(3)

Supreme Court, U.S.
FILED
APR 26 2004
OFFICE OF THE CLERK

No. 03-1292

IN THE

Supreme Court of the United States

Paul Viriyapanthu,

Petitioner

v.

Regents of the University of California

Respondents

On Petition for Writ of Certiorari
To the Second District Court of Appeals,
For the State of California
Division Seven

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Paul Viriyapanthu
Petitioner, in Pro Per
12072 Henry Evans Drive,
Garden Grove, CA 92840
(714) 537-1259

TABLE OF CONTENTS

Page

TABLE OF CONTENTS I

REASONS FOR GRANTING THE WRIT II

I. INTRODUCTION 1

II. THE SUPREME COURT'S ABSTENTION IN ADDRESSING DUE PROCESS IN THE CONTEXT OF LONG TERM SUSPENSIONS OR EXPULSION HAS CREATED IDEAL CIRCUMSTANCES FOR THE GENERATION OF A VOLUMINOUS AMOUNT OF CASES WITH SPLIT RESULTS 1

III. THE LACK OF MEANINGFUL GUIDANCE IS NOT ONLY UNFAIR TO STUDENTS, BUT HAS BURDENED BOTH SCHOOLS AND THE COURTS AS WELL 4

A. THE ISSUES HEREIN AFFECT EVERY SINGLE PUBLIC 6
SCHOOL STUDENT IN THE NATION 6
C. THERE IS A SPLIT OF AUTHORITY 7
D. THE MATTERS PRESENTED IN THIS CASE ARE PURELY A MATTER OF LAW 10

CONCLUSION 11

Cases

Black Coalition v. Portland School District (1973, CA 9 Or) 484 F.2d 1040 at 1045 10
Esteban v. Central Missouri State College, 277 F. Supp. 649 10
Fain v. Brooklyn College of the City University of New York (1985) 492 N.Y.S. 2d 13 9
Foo v. Trustees of Indiana University, (1999) 88 F. Supp. 2d 937 9
Gonzales v. McEuen (1977 CD Cal.) 435 F. Supp. 10
John A. v. City Unified School District (1982 Cal. Sup.Ct.) 33 Cal. 3d 301 ..... 4, 8
University of Tex. Medical Sch. v. Than 901 S.W.2d 11
Wheeler v. Montgomery, 397 U.S. 280, 25 L. Ed. 2d 307, 90 S. Ct. 1026 (1970) 10

Treatises

E.H. Schopler, "Right of Student to Hearing on Charges Before Suspension or Expulsion from Educational Institution 8

James M. Picozzi, "University Disciplinary Process: What's Fair, What's Due, and What You Don't Get", 96 Yale L.J. 2132 at 2134 4

Robert B. Groholski, "The Right to Representation by Counsel in University Disciplinary Proceedings: A Denial of Due Process of Law" 19 N. Ill. U. L. Rev. 739 4

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

Nearly 30 years ago in Goss v. Lopez, (1975) 419 U.S. 565, this Court began to speak in regards to Due Process rights of students at public schools. In Goss, this Court held that Due Process required some type of hearing in connection with the suspension of a student for 10 days from a public school and held that due process was satisfied with an informal 'give and take session' between student and administrator. However the court specifically noted "[l]onger suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures." Goss 419 U.S. at 584.

In the subsequent 30 years this court has never revisited the issue in the context of long-term suspensions or expulsions. In the absence of any type of guidance from this Court, what has resulted is an utter state of chaos in the lower federal and state courts, with some courts holding that, in regards to long term suspensions or expulsions, a adjudicative type hearing is required, while other courts have held that, even were more serious sanctions are involved, an 'informal give and take session' with a school administrator suffices. As it stands now, there is no 'rule of law' in regards to Constitutional right, and the outcome of any particular case is dependent upon the jurisdiction in which it is heard.

II. THE SUPREME COURT'S ABSTENTION IN ADDRESSING DUE PROCESS IN THE CONTEXT OF LONG TERM SUSPENSIONS OR EXPULSION HAS CREATED IDEAL CIRCUMSTANCES FOR THE GENERATION OF A VOLUMINOUS AMOUNT OF CASES WITH SPLIT RESULTS

While in Goss, this Court stopped short of addressing the issue of Due Process in the context of long term suspensions or expulsions, the fact remains that other circuit courts and state supreme courts have *already* interpreted Goss v. Lopez to require an adjudicative hearing when a student faces more serious deprivations. This Court's

abstention from making a definitive ruling has not made the issue go away; rather, the avoidance of the issue has only generated even more litigation.

Petitioner has found no other corollary legal issue for which there is such a wide variation of opinion in an area of law that affects so many individuals. The Goss decision literally governs *every single public school disciplinary proceeding in the nation*, from the elementary school level to the post-graduate university level. Despite the sheer number of individuals affected, the issue is, in effect, *completely unresolved.* The dispute herein is not over a minor issue, such as whether hearsay evidence is admissible in a school disciplinary proceeding, or whether a student has a right to cross-examine an accuser. The dispute here is more fundamental: whether a student has a right to an adjudicative type hearing at all.

Common sense will demonstrate that the current state of the law is ideally suited for the generation of a large amount of cases with split results. In Goss, this Court, in essence, held only that Due Process applies to public school disciplinary proceedings, but exactly what is required for more serious deprivations was left completely unaddressed. The only absolute requirements mandated by this Court were at the very least an informal meeting with a school official when a student faces a short suspension of up to 10 days. It is not that difficult to see why a ruling stating only that the Due Process requires something, but not stating what exactly that something is, would generate confusion, litigation, and split results.

What has happened in the subsequent 30 years following Goss is that schools have began implementing regulations designed specifically to circumvent the additional burden of having to provide an adjudicative type hearing. As Goss did not require an adjudicative type hearing, but only mandated schools provide an informal 'give and take' between student and disciplinarian, schools are providing just that, and only that, even when the ramifications are more severe and despite the fact that this Court made it clear in its holding that Goss was limited only to short term suspensions not exceeding 10 days.

Petitioner is not a junior high school student suspended for 10 days for fighting, and the due process requirements of an 'informal give and take' between student and disciplinarian appropriate in Goss are not appropriate in these circumstances. Rather, Petitioner was a

law student both suspended and dismissed from UCLA Law School on a charge constituting an act of moral turpitude. These charges already have, and will continue to, impair Petitioner's future opportunities. As a direct result, Petitioner's was not initially admitted to practice law, Petitioner has been denied from graduate educational programs he has applied, and has been rejected from employment positions requiring a background screening. None of these deprivations can be described as *de minimus*.

Furthermore, UCLA is not alone in attempting to 'sidestep' procedural fairness. As evidenced by the cases cited to in the writ petition, countless other schools regulations apply Goss's requirement of an 'informal give and take' as a student's sole Due Process protection. All authorities are in agreement that this has led to a proliferation of cases:

> "[T]he lack of a national procedural standard spawned litigation -- as universities were free to call any type of teacher-student meeting a hearing, and students were forced to bring suit to obtain fair procedure." James M. Picozzi, "University Disciplinary Process: What's Fair, What's Due, and What You Don't Get", 96 Yale L.J. 2132 at 2134.

> "[B]ecause of the Supreme Court's dictum in Goss that '[l]onger suspensions or expulsions [from school] . . . may require more formal procedures,' lower federal courts are in a state of confusion as to the amount of process a university student is constitutionally required to receive. This confusion has led to a myriad of lawsuits regarding what amount of process and procedure a student facing university discipline must be afforded." Robert B. Groholski, "The Right to Representation by Counsel in University Disciplinary Proceedings: A Denial of Due Process of Law" 19 N. Ill. U. L. Rev. 739 at 772.

> "[T]he cases are inconclusive and in some disarray....The foregoing list of federal authorities is not exhaustive; litigation by pupils against their schools has proliferated and burdened the courts in recent years." John A. v. City Unified School District (1982 Cal. Sup.Ct.) 33 Cal. 3d 301 at 315-316.

III. THE LACK OF MEANINGFUL GUIDANCE IS NOT ONLY UNFAIR TO STUDENTS, BUT HAS BURDENED BOTH SCHOOLS AND THE COURTS AS WELL

In addition to being unfair to students, this lack of any definitive guidance has also created a burden for schools and the lower state and federal courts obligated to hear these matters as well. The state of confusion cuts both ways, not only generating cases as students are forced to bring suit to obtain procedural fairness, but also generating frivolous suits as well, with an associated drain on the resources of both schools and the courts. As previously mentioned, the Goss decision set forth only a bare minimum standard, but left completely unaddressed the standards for more serious deprivations. Since there is no upper 'threshold' set by this Court, students are also bringing claims for the schools' failure to provide procedural safeguards normally reserved for criminal defendants.

Even if a school drafts procedural fair regulations, and even if the school proceeds follows them, they are still nonetheless not safe from suit since exactly what is required under Goss is amorphous. This ambiguity, in effect, opens the door to various student initiated lawsuits, as it allows for students to make a claim for a wide variety of procedural deprivations, some more valid than others.

The fact remains that education has taken on an increasingly important role in modern society. Given this, it should come as no surprise that a disaffected student would file suit when faced with the loss of an educational opportunity. However, the only guidance provided by this Court in regards to long term suspensions or expulsions is the admonition that "[l]onger suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures."

Without a definitive statement by this Court, the lower courts are thus forced to evaluate each claimed deprivation as they arise, on a one by one basis. What has resulted is a generation of a voluminous amount of cases with an associated drain on judicial resources. As indicated in the writ petition, Petitioner has found over 1,000 published student discipline cases. This state of affairs should not be allowed to continue.

IV. THE MATTERS PRESENTED HEREIN ARE WORTHY OF SUPREME COURT REVIEW

Petitioner respectfully asserts that this matter is truly worthy of review by the Supreme Court. Petitioner understands fully that this Court is not a court of error, but the great institutional overseer of all the courts in the nation. In this instance, Petitioner is not just seeking a redress as to the injustice done to him. Instead, his case is one of thousands. The injustice here is representative of the state of chaos that now permeates the entire system. In the past 30 years, the situation has degenerated to such an extent, that intervention by this Court has become necessary. Furthermore, only this Court can resolve the disputes that have arisen, as only this Court has the power to resolve splits among the federal appellate circuits and state supreme courts. Petitioner respectfully requests that this Court bear the burden of hearing this matter now in order to spare students, schools, and the lower courts from having to bear it in the future.

The uncertainty and inequity that has developed since Goss disserves students, schools, and the lower courts. Students are harmed as they are being denied fair procedure to challenge extremely serious charges made against them. Schools are disserved as, even if they do enact reasonable regulations and enforcement mechanisms, they are still subject to suit since what exactly they must do to ensure a fair procedure has never been defined. The lower courts are caught in themiddle, and now bear the burden of having to hear the multitude of cases that arise, and having to evaluate the procedures on a one-by one basis.

The question that Petitioner poses is this: wouldn't the state of affairs be improved if there were a single, authoritative rule of law? If the Supreme Court were to address the issue of Due Process in the context of more serious deprivations, then schools could draft their regulations accordingly, students would be ensured of having a fair and uniform procedure, and the courts wouldn't be burdened from having to hear countless cases. Or, in the alternative, is it better to leave the situation as it stands, where neither the students nor the schools knows their respective rights or obligations, and the courts are forced to decide the issue with contrasting results.

By every objective standard articulated by this Court, this is a case that is truly worthy of review, based on the foregoing:

A. The Issues Herein Affect Every Single Public School Student in the Nation

The fact that the issues herein are important enough to merit review by the nation's highest court cannot reasonably be questioned. Student discipline matters, by their very nature, are a commonplace occurrence, and the sheer number of such matters heard yearly should persuade this Court that this is an issue of importance to a great deal of people. It is *fact*that Goss v. Lopez remains the definitive statement by this Court on Due Process in the context of public schools and it is this case that governs every single student discipline matter in the nation. It is also fact that Goss v. Lopez specifically did not address student discipline when the consequences exceed a suspension of 10 days, leaving the matter completely unresolved.

In addition, contrary to Respondents contentions, this case is ideally suited for review because, due to Petitioner's status, it involves the maximum possible procedure protections afforded to a student. Petitioner, once again, is not a junior high student suspended for 10 days for fighting. Rather, Petitioner was a law student dismissed on a charge constituting moral turpitude. There is no conceivable set of circumstances in which a student would be entitled to more procedural Due Process. Whatever the procedural protections that should be afforded may be, Petitioner is entitled to the maximum.

A. There Is a Voluminous Amount of Cases Generated

Despite Respondent's assertions to the contrary, there really are a great deal of student discipline cases heard. It is both beyond the scope of the writ petition and reply brief for even a cursory examination of all the cases. Even if Petitioner were to list them, the Court would no doubt verify the results through its own research. The fact remains that there are over 2,700 citing references to Goss and Petitioner has found over one thousand cases subsequent to Goss dealing with the issue of student discipline in public schools. This Court's own independent research should verify the sheer numbers of these cases. Although this particular case was not cited to, it is representative of the cases which are arising in the lower courts.

C. There is a Split of Authority

There really can be no reasonable debate that the authorities are split over this issue. Every single author evaluating the subject notes this confusion:

> "Assuming that a student is entitled to a hearing prior to his expulsion from an institution of learning, a question arises as to what kind of hearing must be given to him. The authorities are not in agreement." E.H. Schopler, "Right of Student to Hearing on Charges Before Suspension or Expulsion from Educational Institution, 58 A.L.R. 2d 903 at page 17.

> "[B]ecause of the Supreme Court's dictum in Goss that '[l]onger suspensions or expulsions [from school] . . . may require more formal procedures,' lower federal courts are in a state of confusion as to the amount of process a university student is constitutionally required to receive." Robert B. Groholski, "The Right to Representation by Counsel in University Disciplinary Proceedings: A Denial of Due Process of Law" 19 N. Ill. U. L. Rev. 739 at 772.

> "[T]he cases are inconclusive and in some disarray....The foregoing list of federal authorities is not exhaustive; litigation by pupils against their schools has proliferated and burdened the courts in recent years." John A. v. City Unified School District (1982 Cal. Sup.Ct.) 33 Cal. 3d 301 at 315-316.

As previously, indicated there is a voluminous amount of cases involving student discipline. In the writ petition, Petitioner has already cited numerous cases from various federal circuits and state supreme courts demonstrating the split of authority. In one final, closing gesture, Petitioner can demonstrate this split simply by comparing his case, to other opinions from other state and federal courts.

In this matter the court, the 2nd District Court of Appeals held that no adjudicative type of hearing was necessary, as all that Due Process required was an opportunity for a student to present his side of the story:

> "So long as there is 'effective notice' and 'an informal give-and-take between student and disciplinarian,' the [U.S. Supreme] court left to the discretion of the disciplinarian whether to permit the presentation of witnesses, cross-examination, etc." Appellate court opinion at 12. [Pet. App. A-14.]

The Appellate Court, in making its decision, relied on Foo v. Trustees of Indiana University, (1999) 88 F. Supp. 2d 937 at 952:

> "in a school disciplinary proceeding, administrator complied with due process requirements where he gave the student notice of the charges against him, showed him the evidence supporting the charges, questioned the student about the alleged misconduct, and allowed the student to tell his side of the story." Appellate court opinion at page 14 [Pet. App. A-15.]

and also on the case of Fain v. Brooklyn College of the City University of New York (1985) 492 N.Y.S. 2d 13:

> "A formal hearing is not required in the context of a student disciplinary proceeding. The student must be given notice of his alleged misconduct, be told the basis of the accusation against him, and be afforded an opportunity to explain his version of the facts." Fain at 13 [Pet. App. A-15]

Compare the California Appellate court's opinion with that of the California 9th circuit courts:

> "The Supreme Court in Goss recognized that longer suspensions or expulsions may require more formal procedures. Goss clearly anticipates that where the student is

> faced with the severe penalty of expulsion he shall have the right to be represented by and through counsel, to present evidence on his own behalf, and to confront and cross-examine adverse witnesses." Gonzales v. McEuen (1977 CD Cal.) 435 F. Supp. at 467.

Similarly, the 9th Circuit Court of Appeal came to a similar conclusion:

> "The district court held that the expulsion procedures were unconstitutional for failing to provide a hearing at which the student could be represented by counsel and, through counsel, present witnesses on his own behalf, and cross-examine adverse witnesses. Other courts have held that a hearing incorporating these safeguards must be held before or shortly after a child is expelled or suspended for a prolonged or indefinite period. Esteban v. Central Missouri State College, 277 F. Supp. 649 (W.D. Mo. 1967). *See also* Goldberg v. Kelly, *supra*, and its companion, Wheeler v. Montgomery, 397 U.S. 280, 25 L. Ed. 2d 307, 90 S. Ct. 1026 (1970). *See, generally*, C. Wright, The Constitution on the Campus, 22 VAND. L. REV. 1027 (1969); W. Seavey, Dismissal of Students: "Due Process," 70 HARV. L. REV. 1406 (1957). We agree and therefore affirm the district court's holding that the expulsion procedures followed by defendant school board were unconstitutional." Black Coalition v. Portland School District (1973, CA 9 Or) 484 F.2d 1040 at 1045.

In addition, the Texas Supreme Court held that Due Process in connection with a long term suspension or expulsion requires an adjudicative type hearing, and invalidated the expulsion of a medical student, due to his exclusion from a portion of the proceedings:

> "[W]e note that UT, pursuant to its own rules and regulations, afforded Than a high level of due process. Than was given oral and written notice of the charges against him; was given written notice of evidence to be used against him the hearing, including a witness list and summaries of their testimony; was

> afforded the right to counsel or other representation; and was afforded a formal hearing with the opportunity to present evidence and cross-examine witnesses. Despite this level of process, we conclude that Than's due course of law rights were violated by his exclusion from a portion of the evidentiary proceedings." University of Tex. Medical Sch. v. Than 901 S.W.2d at 931.

The point is this: if a state court decides a matter of constitutional law (which should, in theory, should protect rights uniformly) differently from the local federal court, literally across the street, or differently from a state supreme court, or a federal court of appeals, there is a problem. These citations alone demonstrate a split of authority, in this case between a California state court, New York state court, and Indiana federal court against the federal court of California, the 9th Circuit Court of Appeals and the Texas Supreme Court. The cases cited in the writ petition demonstrate that this split is nationwide.

D. The Matters Presented in this Case Are Purely A Matter of Law

In the opposition brief, Respondents have attempted to muddy the issue. Respondents mischaracterize and omit significant facts. The most significant is that Petitioner 'admitted culpability'. What they neglected to state was that Petitioner only made statements after the reviewing dean threatened to expel him permanently and erase all of his earned credits if he did not comply.

However, in the end, the disputes of fact are irrelevant in this matter. This matter is purely a matter of law, which the lower courts themselves acknowledged:

> "[Petitioner's] claim is based only upon the denial of an evidentiary hearing, his right to which presents purely an issue of law..." Pet. App. 1.

The reason that this matter is purely a matter of law is that under UCLA policies, a student has no 'right to a hearing'. The student has no say in whether or not such a hearing will take place.

Petitioner requested that such a hearing take place, but this was denied by school officials. If such a hearing is a 'right', then the choice belongs to the student as to whether to take it.

Both the trial and appellate courts recognized that this was the issue. The bulk of both decisions was to determine whether, under case law, a student has a constitutional 'right' to have an adjudicative hearing, because under UCLA policies there is no such right. This is the *only* issue presented in this case, and the only issue which this court need decide, is whether a student is entitled to an adjudicative type hearing as a matter of right.

This court need not concern itself with factual disputes, because any factual disputes are irrelevant. The only issue asked to be adjudicated here is whether student regulations, which authorize a school to suspend and dismiss a student without an adjudicative type hearing, is invalid.

Furthermore, to hold so is not an unreasonable request as this Court has held that such hearings necessary in other matters of moderate importance, such as the termination of government employment (Gilbert v. Homar (1997) 520 U.S. 924; Cleveland Bd. of Ed. v. Loudermill (1985) 470 U.S. 532), the revocation of a state driver's license (Bell v. Burson (1971) 402 U.S. 535), the termination of welfare benefits (Goldberg v. Kelly (1970) 397 U.S. 254), and even convicted felons faced with revocation of 'good time' credits (Ponte v. Real (1985) 471 U.S. 491). It would be a strange set of circumstances if a convicted felon is entitled to more procedural protection than a public school student.

CONCLUSION

The petition for a writ of certiorari should be granted.